

IN THE SUPERIOR COURT OF GUAM

CASSANDRA CHAU TRUONG,)	CIVIL CASE NO. CV1082-06
Administratrix of the Estate)	
of ROLAND ANTHONY BOUDREAU,)	
deceased,)	
)	
Plaintiff,)	
)	
vs.)	
)	
AIOI INSURANCE COMPANY, LTD.,)	
)	
Defendant.)	

TRANSCRIPTION

OF

HEARING BEFORE THE HONORABLE

JUDGE ARTHUR R. BARCINAS

November 14, 2007

COPY

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Hearing before the Honorable Judge Arthur R. Barcinas, Wednesday, November 14, 2007 at 10:24 a.m., at the Superior Court of Guam; Guam Judicial Center 120 West O'Brien Drive, Hagatna, Guam. That at said time and place there transpired the following:

APPEARANCES

For the Plaintiff

LAW OFFICE OF TEKER TORRES &
TEKER, P.C.
By: **Joseph C. Razanno, Esq.**

For the Defendant

LAW OFFICE OF DOOLEY ROBERTS &
FOWLER, LLP
By: **Tim Roberts, Esq.**

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1 HAGATNA, GUAM, WEDNESDAY, NOVEMBER 14, 2007; 10:24 A.M.

2

3 MR. ROBERTS: Good morning, Your Honor.

4 JUDGE BARCINAS: Good morning. You're
5 going to have to educate me on this because
6 frankly I didn't have the time to review this
7 motion.

8 MR. ROBERTS: Can do, Your Honor.

9 JUDGE BARCINAS: Yes.

10 MR. ROBERTS: Let me ask you first, is
11 Your Honor a golfer? You've golfed before?
12 This involves a golf cart, this accident. So
13 I'm wondering, do you know how the basic golf
14 cart --

15 JUDGE BARCINAS: I have chased golf
16 balls and --

17 MR. ROBERTS: Okay.

18 JUDGE BARCINAS: -- operated golf carts
19 in fear of my life going down those slippery
20 bridges, but yeah --

21 MR. ROBERTS: Okay.

22 JUDGE BARCINAS: -- I have some sense
23 of that. Yes.

24 MR. ROBERTS: As I alluded to just now,
25 this accident involves a golf cart. The

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1 plaintiff is Cassandra Casey Truong. She is
2 the widow of a deceased person named Roland
3 Boudreau. This accident happened on April 2nd,
4 2005 after the Three Doors Down concert here on
5 Guam. The accident happened when Ms. Truong
6 was driving a golf cart with her friend in the
7 passenger seat. Her husband Roland Bouderau
8 and another person hanging on to the back of
9 the golf cart where your golf bags are stored,
10 they were driving down an asphalt paved area at
11 Polaris Point, where the concert was held, when
12 Mr. Boudreau either jumped off back or fell off
13 the back and was killed.

14 One month after the accident, Ms.
15 Truong gave a sworn statement to the Navy where
16 she didn't mention any potholes or dangerous
17 conditions or any other cause for the accident,
18 other than her understanding was that Roland
19 had jumped off the back of the golf cart to
20 retrieve one of his zories that had fallen off.

21 So, this being a modern society,
22 naturally a lawsuit results. Ms. Truong filed
23 a complaint against her employer, Ambros, which
24 was a sponsor, one of the sponsors of the Three
25 Doors Down concert. In her complaint, she had

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1 -- there are two basic allegations of
2 negligence -- there's only two -- any
3 allegations of negligence in the complaint.
4 First, Ms. Truong alleges, "Well, Ambros failed
5 to train me how to drive a golf cart", and
6 that's how the accident happened. Second
7 ground for liability is that Ambros is liable
8 on a respondeat superior basis, because an
9 employee of Ambros, active of course in the
10 scope of her employment, negligent, drove the
11 golf cart and killed Mr. Boudreau, where, of
12 course the employee is Ms. Truong.

13 So, she is saying that, "I got in an
14 accident and killed my husband, and now my
15 employer's strictly liable for that, and must
16 pay me damages because I was acting of course
17 in the scope of my employment."

18 So, I took Mrs. Truong's deposition,
19 and I asked her about both of these grounds for
20 liability, or some grounds for alleged
21 negligence on Ambros's part. In regards to the
22 first one, "Ambros failed to train me how to
23 drive a golf cart", I said, "Casey, you're a
24 golfer, aren't you?" She said, yeah. And I
25 said, "Well, you already knew how to drive a

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1 golf cart, didn't you?" She said, well, yeah.
2 So that theory is gone, and in fact it's
3 abandoned in the opposition to this motion to
4 summary judgment, you won't find any argument
5 in the opposition on this particular theory of
6 relief (sic). So I suggest for all practical
7 and legal purposes, it's gone.

8 The second ground, respondeat superior
9 liability, Mr. Razzano and I have gone back and
10 forth in a fairly spirited way on this theory.
11 I've argued, correctly, I think, that in order
12 for respondeat superior liability to apply, the
13 employee in question through whom the employer
14 is acting has to be negligent. The employee is
15 not negligent, then there's no respondeat
16 superior liability. There's no reason to hold,
17 or no grounds upon which to hold the employer
18 strictly liable based on the actions of its
19 employee.

20 So, I asked Casey in her deposition,
21 "Casey, what did you do wrong?" "Nothing".
22 "Was your negligent, were you negligent?"
23 "No". "What did you do or fail to do that may
24 have contributed to your husband's death?"
25 "Nothing". I gave her three chances, she

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1 denied it under oath each time, and I should
2 add that subsequently -- oh, I forgot to say
3 this. Ms. Truong is suing the United States
4 Government too, in Federal Court. She has sued
5 the United States Navy for maintaining a
6 dangerous condition at Polaris Point. So the
7 U.S. Attorney, Assistant U.S. Attorney Michael
8 Schwab took Casey's deposition in the federal
9 case and this is attached to a declaration in
10 filing support in his motion.

11 Michael asked her 6 or 7 times what she
12 did wrong. She said, "Nothing, nothing,
13 nothing." Denied it 6 or 7 times that she did
14 anything wrong. So in my favor, I've argued,
15 again correctly, I submit that this absolutely
16 precludes any recovery by a case against Ambros
17 in respondeat superior belief. Mr. Razzano has
18 characterized Ms. Truong's testimony as her
19 personal opinion. Her personal opinion is not
20 relevant here, well, if it's not her personal
21 opinion, I asked her what she did wrong, she
22 said nothing.

23 There's no evidence in the case right
24 now, Judge. There's no evidence that Ms.
25 Truong was in fact negligent. What she needed

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1 to do to save her respondeat superior case is
2 say, "Yeah, I was a little bit negligent." But
3 she didn't. Now, today, there's no evidence of
4 Ms. Truong's negligence, and in fact you'll
5 find no admission of Ms. Truong's negligence in
6 the papers filed by Mr. Razzano.

7 All right. So she loses as a matter of
8 law, Ms. Truong loses as a matter of law in a
9 respondeat superior liability. So there went
10 both grounds for negligence alleged in the
11 complaint, but, in her deposition another
12 theory surfaces. She said, "Polaris Point has
13 potholes in it. The ground is bumpy and that's
14 what caused the accident." This is a species
15 of a premises liability cause of action. She's
16 saying that Ambros controlled Polaris Point,
17 you know, it's owned by the United States Navy,
18 and that which certainly comes as a surprise to
19 the United States Navy that Ambros controlled
20 Polaris Point.

21 But, she's saying that it was a
22 dangerous condition, the potholes there, and we
23 were on notice of it, we're liable. But in
24 fact, I submitted three or four declarations in
25 support of my motions by Ambros management

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1 personnel saying, "We inspected this place
2 before this concert, we inspected it before
3 prior concerts, there's been several concerts
4 here over the years, there's never been an
5 accident, there've been golf carts used at this
6 Polaris Point for Ambros-sponsored concerts
7 before, there's never been an injury, never
8 been an accident, no one's complaining." Casey
9 Truong herself drove this golf cart all day
10 long over that asphalt area without any
11 incident, as did five other Ambros employees
12 and, I forget the number, 10 or 15 Navy
13 employees were driving golf carts. There were
14 no accidents.

15 So, it's undisputed on this motion
16 today that Ambros had no actual or constructive
17 knowledge of any danger expedition. That
18 argument in favor of summary judgment, is not
19 opposed in Ms. Truong's opposition papers.
20 It's ignored, and so I suggest we ought to win
21 on that one, as a matter of law too. They
22 never even tried, the opposition, Ms. Truong
23 has never even tried to prove that Ambros had
24 actual destructive knowledge.

25 And now the Guam Supreme Court,

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1 McDonald -- Guerrero V McDonald's case of last
2 year without actual or constructive knowledge
3 or danger expedition on your property, you
4 can't be held liable as a controller or
5 possessor of land.

6 So, that was the only other possible
7 theory of relief that surfaced in the
8 deposition. And that's three of them now, and
9 I think they're all agreed on.

10 Another ground for -- the fourth one,
11 surfaced in Ms. Truong's opposition papers to
12 the motion for summary judgment. She's argued
13 that Ambros served too many beers to Mr.
14 Boudreau, and that's why -- I won't
15 mischaracterize Mr. Razzano's argument.

16 Mr. Razzano has argued, if Mr. Boudreau
17 was intoxicated, it was because Ambros served
18 him too many beers. The problem with that,
19 that's a dram shop theory of liability. That's
20 a -- you're saying, you know, in some states
21 their statute said, you serve alcohol to a
22 minor or to an "obviously intoxicated person"
23 you can be held civilly liable. At common law,
24 prior to these statutes, you could not be held
25 simply liable, the court said, wait a minute.

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1 It's not the salon's service of alcohol that's
2 the approximate cause of an accident it's the
3 drunk's voluntary consumption of alcohol that
4 is the approximate cause of an accident. So
5 you could not sue of tavern or a liquor server
6 at common law, because you drank too much and
7 hurt somebody, you hurt yourself.

8 A lot of states pass statutes saying,
9 we're going to oppose civil liability on
10 somebody but those statutes all say to a minor
11 or to an obviously intoxicated person. Guam
12 has a statute which it borrowed from California
13 which penalizes administratively -- if someone
14 with a ABC liquor license holder serves alcohol
15 to a habitual drunkard, I'm quoting, or
16 obviously intoxicated person, there's a penalty
17 imposed.

18 California, before one case in the 1973
19 Vessily versus Seeger (phonetic) had never
20 ruled that that statute serve as a basis for
21 civil liability, it's just an administrative
22 penalty. But when the California Supreme Court
23 held that in Vessily versus Seeger 1973,
24 California was outraged, everyone was up in
25 arms and so the California legislature

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1 immediately amended the statute to add
2 subsection B and C saying, notwithstanding
3 anything that was said before, the service of
4 alcohol to an obviously intoxicated person
5 shall not serve as the grounds for civil
6 liability against the salon keeper.

7 So, under any scenario for this dram
8 shop theory which has been raised in the
9 opposition memorandum for the first time, not
10 really raised saying, if he was drunk, it was
11 Ambros' fault. Under any scenario it requires
12 some evidence that an Ambros employee served
13 alcohol to Mr. Boudreau at a time he was
14 obviously intoxicated.

15 You know, there's no evidence in the
16 record that you'll see on this hearing or in
17 the paper that are currently filed, but when
18 certain deposition transcripts are ready I will
19 file those. I took the depositions of three
20 witnesses, all the rest of the people that were
21 in the two carts that were in the vicinity of
22 this accident. Now, they've all been deposed,
23 I asked everyone of these people, all obviously
24 friends of Ms. Truong, "Was Roland Boudreau
25 obviously intoxicated at any time of day?" and

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1 they all said, no, absolutely not.

2 So, there won't ever be any evidence
3 that Mr. Boudreau was served alcohol by an
4 Ambros employee at a time that he was obviously
5 intoxicated. Therefore, even if Guam did have
6 dram shop liability, which I don't think that
7 it does, Guam Supreme Court's never ruled that
8 it does. Even if it did, there'd be no grounds
9 for liability because there's no evidence that
10 Mr. Boudreau was served alcohol, at the time he
11 was obviously intoxicated.

12 Last point, there's another, I forgot.
13 There's a fifth, grounds for negligence raised
14 in the opposition memorandum. It is something
15 called a sponsorship for control theory of
16 relief. This was on as a separate section in
17 his opposition memorandum on sponsorship
18 liability. He cites cases where an entity will
19 sponsor a 4th of July event but something goes
20 wrong, somebody gets hurt and the sponsor gets
21 held liable.

22 One of the case cited, a case cited is
23 -- man, what was it? Davidson versus somebody
24 case out of New York where a rock band,
25 somebody sponsored a show and a fire happened,

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1 200 people got killed. And so -- was it Great
2 North, was that the band?

3 MR. RAZANNO: Gray versus Deerderring
4 (phonetic) the Whitesnake case.

5 MR. ROBERTS: Whitesnake. The
6 Whitesnake case. Well, lots of people were
7 killed and liability was opposed because --
8 well, imposed on the sponsor for a variety of
9 reasons. But in all those cases Judge, there's
10 still got to be negligent. You're not liable
11 as a sponsor just because you sponsored
12 something and an accident happens. There still
13 got to be negligence. And in those cases there
14 were. There was faulty wiring in the
15 Whitesnake case. There was negligent leaving
16 of dangerous fireworks for a minor -- or no,
17 the firework was fired negligently off the
18 premises and burned somebody's house.

19 And another case, a left fielder was so
20 angry by something that happened in a baseball
21 game, he threw a ball as hard as he could in to
22 the crowd. The sponsors in those cases were
23 held liable, but there was negligence on
24 someone's part. And here, there's no
25 negligence on Ambros' part, so this sponsorship

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1 thing as a theory of recovery doesn't apply.

2 JUDGE BARCINAS: Thank you.

3 MR. RAZZANO: Of course, Judge, we
4 completely disagree. I mean, let's just think
5 about this whole concept of Ms. Truong saying,
6 "Well, I wasn't negligent." Well, if that was
7 all an employer had to view, and every time an
8 employer was sued for negligence, they would
9 simply bring in the employee, sign an affidavit
10 that says, "I didn't do anything wrong," and
11 then all of a sudden the employer would be
12 relieved of liability.

13 And in fact, the McDonald's case that
14 Mr. Roberts cites, says exactly that on Page 6
15 of the opinion. It says, "We acknowledge that
16 a balance is necessary, on the one hand,
17 Plaintiff cannot be burdened with having to
18 show the Defendant's subjective knowledge of a
19 dangerous condition." This is virtually
20 impossible because then a store owner needs
21 simply disavow knowledge -- the dangerous
22 condition and he avoids all liability. That's
23 exactly what this is about.

24 Mr. Roberts wants to say that because
25 Ms. Truong says she's not negligent during this

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1 that she actually wasn't negligent. That's not
2 true. You have to look at the facts of what
3 was on, and here are the facts. Ms. Truong is
4 at work for Ambros at this concert, she is the
5 marketing manager for Ambros. Ms. Truong has
6 submitted an affidavit, and said she was
7 drinking on the day of the concert, and then in
8 fact many employees were drinking on the day of
9 the concert. In addition, Mr. Roberts submits
10 her deposition transcript and on Page 18, line
11 20 through 25. He says, "Were you drinking?
12 Yes." So she's drinking at work. Now, whether
13 she thinks that drinking at work is negligent
14 or not, the fact of the matter is she drinking.

15 All right. Next, she decides that she
16 is going to put six people in a golf cart.
17 Okay? Now, this is an Ambros employee, comes
18 over to six people and invites them to get in
19 the golf cart. Six people, Judge. Mr. Roberts
20 says to her, "Well, why did you put six people
21 in the cart? I don't know. They all needed a
22 ride." Okay, they all needed a ride so she
23 puts six people in a golf cart after she's been
24 drinking, and she starts to drive the golf cart
25 going across a bumpy area with potholes. And

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1 we submitted depositions and photographs to
2 show you the condition of the property.

3 Another Ambros employee, Sean Pascua
4 (phonetic), he realizes, "That's dangerous. I
5 better go over there and do something." He
6 goes over and says, "Hey, let me take some
7 people in this cart." Two people then get out
8 of the cart and they get on to Mr. Pascua's
9 cart, another Ambros employee. He puts two --
10 he puts three people in that cart, and has one
11 person standing on the back of the golf cart
12 where the golf bags go.

13 Mr. Aguon submitted a declaration and
14 had his deposition taken. He says, "I told
15 people not to do that." So that means that
16 Sean Pascua is in fact -- well, we know that
17 this is the facts. Sean Pascua then violated
18 what Ambros told him and put three people in a
19 cart when he wasn't supposed to have three
20 people.

21 Now, you've got two golf carts with too
22 many people in it, employees drinking and
23 they're driving down a bumpy road full of
24 potholes and railroad tracks, by the way,
25 there's railroad tracks in the middle of this

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1 concrete. All the evidence for that is on
2 Casey Truong's deposition Page 43 Line 9
3 through Page 44 Line 3.

4 In addition, this accident happens at
5 7:00 at night. So when he tells you that these
6 potholes are open and obvious, they're not open
7 and obvious. We all know what it's like 7:00
8 at night in April. It's pitch black outside.
9 How are you supposed to see? No headlights on
10 these golf carts, and you've got, so now you've
11 got two Ambros employees at night, no
12 headlights on the cart, driving, more people
13 than Ambros told them to have in the carts,
14 directly down the road after being, after
15 having cocktails. That's what you got so far.

16 And then the next is, of course we
17 know, I told you about the un-level ground full
18 of potholes, that's even -- look at Carlos
19 Lizama's affidavit and a photo submitted, and
20 well, you can take a look at the Truong
21 Deposition Page 19 Line 19 through Page 21 Line
22 19. That'll tell you about the condition of
23 the road. And in fact Mr. Roberts asked her,
24 "Tell me about the condition of what you think
25 Ambros did." And she says, "Ambros had the

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1 opportunity to, and had a duty to make sure
2 that when they invite 5,000 people at Polaris
3 Point, that it's safe to have a concert there."

4 Mr. Roberts in his declaration, Tom
5 Shimizu and a couple other Ambros employees,
6 who say they went out there and they inspected
7 it. Now his argument is, well, because Tom
8 went out there and said he inspected it, he
9 thought it was okay. Well then, it's fine.
10 There's no negligence. There's nothing wrong
11 with the property. Tom said it was fine.
12 Well, that can't be right, Judge.

13 We have to look at the facts and
14 circumstances on what went on that day. Not
15 Mr. Shimizu's opinion of whether he should have
16 to pay damages in this case or not. And of
17 course, that is directly what McDonald's and
18 Guerrero's report says.

19 So, when he says that Casey simply says
20 she's not negligent, I mean, you basically got
21 a woman who's involved in an accident, her
22 husband passes away, and he asked her, is it
23 your fault? I mean, what is she going to say?
24 Well, that's why negligence historically for
25 the last, well, since basically the beginning

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1 of jurisprudence, has always been a fact issue
2 because even if somebody thinks they're not
3 negligent, you have to determine on the facts
4 and circumstances whether they actually acted
5 in a negligent manner. I mean, certainly,
6 Judge, if the rule was, I file a lawsuit, you
7 file an answer, and says you didn't do anything
8 wrong, I mean I could clear your docket almost
9 every case in this court room today. Because
10 I'm almost positive that most people have filed
11 an answer saying they didn't do anything wrong.

12 So that's the negligent -- now, let's
13 talk about this premises liability theory.
14 Now, Mr. Roberts tells you, and he tells you
15 correctly, the general rule is you have to be
16 an owner or in control of the property in order
17 to have premises liability theory. Well,
18 that's exactly what the sponsorship liability
19 cases say. A sponsorship liability cases say
20 that if you are the sponsor and you are in
21 control of the premises, you have a duty to
22 ensure that people are taken care of. Okay.

23 And that's what this whole motion was
24 about. It's about duty. They didn't have a
25 duty to do anything. They didn't have a duty

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1 to inspect the premises. They didn't have a
2 duty to train anybody. They did not have a
3 duty to anybody. They just collected a bunch
4 of money that day. That's all they were in
5 charge of, you know, is collecting cash.

6 If you look at the sponsorship
7 liability cases, and actually I don't
8 understand where he's going with this dram shop
9 liability thing, because actually the only
10 reason we mentioned that in our brief is
11 because he submits evidence to the court that
12 the guy is intoxicated.

13 If you look at the Sponsorship
14 Liability Section in my brief, the reason we
15 talked about control of the beer is because
16 many, many courts have said they will impose
17 control upon a sponsor if they're controlling
18 the logistics of the concert, and one of the
19 main logistics of the concert is beer. We
20 didn't just cite beer cases. We cited a case
21 that Pepsi Cola sponsored a ride, the court in
22 that case found they didn't have control over
23 that ride.

24 So, when the child was injured during
25 that case, they didn't find they had

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1 sponsorship liability, because someone else was
2 in control of the ride. So the key is control.
3 And we know from the interrogatory signed by
4 Mr. Shimizu that he was the one who decided
5 with Lee Vave (phonetic) from Anheuser-Busch to
6 have this concert.

7 They worked with Malafuction
8 Productions and Carl Pangelinan from the very
9 beginning to get the logistics to get in this
10 concert. Mr. Pangelinan's affidavit is on file
11 with the court, talks about his contractual
12 responsibilities with MWR, and the fact that he
13 knew immediately, he couldn't handle these
14 responsibilities, and Ambros decided they would
15 pick up those responsibilities in order to make
16 the money.

17 So, Shimizu and Bab (phonetic) decided
18 we're going to do this concert. They have
19 meetings weeks before. All you got to do is
20 look at the affidavits, and as a matter of fact
21 we're going to submit these other deposition
22 transcripts, and those deposition transcripts
23 will talk about the meetings that were attended
24 between Ambros and MWR, and they went out
25 inspecting the premises. And that's with Mr.

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1 Shimizu's declaration says, we inspected the
2 premises. Well, what did you do? I mean, he
3 didn't see the potholes, everyone else saw the
4 potholes, everyone else saw the train tracks,
5 but he decided that it was okay. So, that's
6 Mr. Robert's theory that there's no negligence.

7 But back to the sponsorship case. The
8 Whitesnake case actually, I mean, there's a lot
9 of good cases in this section, but the
10 Whitesnake case is actually the most important
11 case. It's the most recent case on sponsorship
12 liability, it comes out of the District Court
13 of Rhode Island, and I think we all know the
14 Whitesnake case because we all heard about the
15 fire that occurred there and the people were
16 trapped and 200 people died. They sued the
17 sponsor in that case, and of course, the
18 sponsors insurance carriers said, "We're not
19 responsible for this. We don't have anything
20 to do with it. It was the guy who had
21 maintained the fireworks portion of the
22 concert."

23 When I lay out in Page 7, 1, 2, 3, 4
24 and 5 going on to Page 8, citing the evidence
25 in the deposition transcripts and the

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1 affidavits in that section, those five factors
2 are exactly what the Rhode Island District
3 Court looked at to impose sponsorship
4 liability, i.e. a duty to protect those
5 patriots. Okay.

6 Even though they subcontracted out the
7 fireworks portion of the concert, because the
8 sponsor was in control of the bar, in control
9 of the beer, in control of the promotional
10 activities, in control of the tickets sales,
11 they were the ones who were responsible, not
12 the subcontractor. Okay. And that's the key
13 to those -- key is, who ran the concert. All
14 you got to do is look at the facts.

15 Ambros ran the concert. Ambros sold
16 the tickets. Ambros coordinated the
17 promotional activities, including the radio
18 sponsors. Ambros hired the MC, Rick Nauta from
19 Hit Radio 100. And when Mr. Roberts tells you
20 that I haven't brought back any facts that
21 contravert (sic) his assertions, I think you'll
22 notice in his reply that he doesn't mention
23 sponsorship liability one time.

24 Now, and he doesn't bring any evidence
25 forth from any of his witnesses to say that

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1 they weren't in control of the concert. Why?
2 Because they were in control of the concert.
3 He decides to go ahead and tell you about some
4 dram shop liability theory. Then he tells you,
5 he doesn't even know what the law on dram shop
6 liability theory is. He might be responsible
7 under that theory but he just doesn't know.

8 Nevertheless, the most important part
9 of the motion is Sponsorship Liability -- in
10 those cases carefully, and the proceeding cases
11 that are holding sponsors liable when they're
12 in control of the concert and the premises, et
13 cetera, et cetera, and that's where this all
14 comes from.

15 Now, he draws this -- well, let me make
16 one other point. In all these sponsorship
17 liability cases in the -- I wrap it up on, I
18 think on page -- after I talk about the Double
19 Play Tavern case, I think I wrap it up by
20 saying it's the reasonable inferences that are
21 the most important portion of the Sponsorship
22 Liability.

23 Reasonable inferences are just saying -
24 - are basically fact issues Judge. And if you
25 take a look at the McDonald's case where he's

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1 deciding he wants to draw the battle line,
2 Footnote 3 in that case talks about Ortega and
3 the theory of liability in the duties imposed
4 under the Ortega case out of California. This
5 is a quote. "An inference is the deduction
6 which the reason of the judge or jury makes
7 from the facts proved without an express
8 direction of law to that effect". And the
9 court cites 6GCA 5103.

10 And so, basically they are telling us
11 that an inference is a fact issue. That's
12 exactly what they're telling us. McDonald's,
13 is a very limited rule. I mean, if you
14 remember, I mean, we all cited Johnson's, it's
15 about the only case on negligent theory out of
16 the Supreme Court. But what they say is that,
17 I want to make sure I give you this quote
18 correctly, because this is what they say --
19 okay. "We agree with said policy on underlying
20 requirement that Plaintiff provided the
21 property owner, caused to dangerous condition
22 or had actual or constructive knowledge of such
23 condition."

24 Well, when Mr. Roberts submits his
25 declarations from Mr. Shimizu and the other

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1 Ambros employees saying that they went out and
2 inspected the premises, they had. They
3 definitely, they didn't have constructive
4 knowledge. They had clear knowledge. They
5 went out there. They inspected the premises.
6 They saw that there were train tracks. They
7 saw that there were potholes. And not only did
8 they decide they were going to have a concert
9 there, they go ahead and say, "Let's go ahead
10 and use some golf carts as well."

11 Now, duly, when he says we had -- they
12 had a duty to train Ms. Truong how to use the
13 golf cart, they had more than duty to train Ms.
14 Truong. They had a duty to train any Ambros
15 employee who's going to operate that vehicle on
16 that day to ensure that everybody at that
17 concert was safe.

18 Julia Pocaigue resubmits an affidavit
19 to the court saying she's an Ambros employee.
20 She was given a cart. She had no idea how to
21 drive a golf cart. I mean, Ms. Pocaigue had to
22 ask her son to instruct her on how to use the
23 golf cart. So they gave somebody who didn't
24 know how to use a cart, they just launched to
25 use it.

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1 On the 18th GCA 9108R, I disagree with
2 Mr. Roberts' assertion. I don't think the
3 estate has any liability. Nevertheless, I'm
4 not going to belabor the point. We've briefed
5 it. Judge, if you think that's the winning
6 argument for his case, then I just simply ask
7 you to let me amend and I'll bring forth a
8 different, I mean, I'll just get a different
9 administrator. He not take this woman's case
10 away from her based on that type of theory.
11 Nevertheless, I still do work right along. We
12 opened an obvious document, we didn't really
13 cover it, but it's pitch black outside, the
14 thing happened at 7:00 at night, there's no
15 headlights, I think we all know it's difficult
16 to deal an obvious when we can't see.

17 Again, it's not a dram shop liability
18 theory case. Nevertheless, he admits he
19 doesn't know what the law is under Dram Shop
20 Liability, anyway. This negligence case is
21 based on Ambros duty and control and their
22 failure of their responsibility to protect the
23 invitees that they had. Ambros asks us all the
24 time to drink responsibly, and they had a
25 seminar regarding that over the next three

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1 days, and all we're asking is that they act
2 responsibility in this case and realize that
3 they had a duty, the court acknowledge that
4 duty, and in the future, avoid these types of
5 accidents. Judge, thank you very much.

6 JUDGE BARCINAS: Thank you. Mr.
7 Roberts?

8 MR. ROBERTS: I think Mr. Razanno made
9 one reference to a statute. I know the court
10 had said they hadn't read the briefs.

11 JUDGE BARCINAS: Right.

12 MR. ROBERTS: So I'll explain what
13 reference he's -- what he's talking about.
14 This is in response to, in connection with the
15 respondeat superior theory of relief. I have
16 argued that under Guam's Contributory
17 Negligence Statute, Casey is legally barred
18 from recovering under respondeat superior
19 theory, because under that statute, if the
20 negligence of the person from whom recovery is
21 sought, is as -- excuse me, let me start again.
22 Under that statute, if your negligence is as
23 great as the person from whom recovery is
24 sought, you can't recover.

25 Well, here, Casey, Ambros' negligence

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1 is Casey's negligence. Her negligence will
2 always be as great as or as small as. It'll
3 always be equal to Ambros', because Ambros only
4 acts through Casey, in connection with the
5 respondeat superior argument. In a respondeat
6 superior case, there is no negligence on the
7 part of the employer. The negligence is by the
8 employee which is attributed to the employer
9 who is strictly liable as a matter of policy,
10 respondeat superior means in Latin, I think,
11 let the master answer. So I've argued that
12 there can't be any respondeat superior because
13 Casey's negligence will always be the same as
14 Ambros is negligent. It's the same negligence.

15 Neither Mr. Razzano or I could find a
16 case saying that or not saying that. There are
17 no cases on it that we've been able to find.
18 But it makes sense. It's logic, it's common
19 sense. And if I'm wrong and Mr. Razzano's
20 right, then we'll have a rule on Guam that a
21 wife, anytime a wife kills her husband when
22 she's performing a job related task, she could
23 sue her employer and make it strictly liable to
24 pay her damages, and I don't think society
25 would tolerate a rule like that. Anyway,

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1 that's the argument that Mr. Razzano referred
2 to near the end. I'll go back to the beginning
3 now.

4 In reference to Casey's statement that,
5 "Hey, I wasn't negligent." I didn't
6 manufacture that testimony. I didn't put a
7 declaration in front of my own client and say,
8 "Sign to say you weren't negligent, and we'll
9 get you off the case." This is an -- this is a
10 plaintiff. I gave her a chance to say what she
11 did wrong. I didn't manufacture this
12 testimony.

13 So, the argument that anytime a
14 defendant signs an affidavit saying I didn't do
15 anything wrong, that doesn't make sense. These
16 aren't my own client's words, these are Joe's
17 client's words. And the second, then Joe went
18 and talked about the McDonald's case, and again
19 he referenced where a storekeeper -- or signs
20 an affidavit saying he's not on notice of any
21 dangerous condition. Can he thereby avoid
22 liabilities by signing that affidavit? That
23 was a different situation at McDonald's.

24 What the court, the Guam Supreme Court
25 was talking about was, in the absence of any

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1 evidence of actual inspections, the storekeeper
2 can't just sign an affidavit saying, "I didn't
3 know nothing. So I can't be liable." In
4 McDonald's, there was evidence of regular
5 inspections, the same as there is in this case.
6 In other words, Ambros is not saying, "I didn't
7 know anything about any dangerous conditions,"
8 and just say, "You can't hold me liable now."
9 It's saying, "I went out and inspected this
10 place and there has never been any previous
11 accidents. I didn't see any dangerous
12 condition. Nobody else fell off the back of a
13 golf cart and died that day. Nobody else has
14 fallen on back of a golf cart in previous
15 concerts. Nobody has ever complained to us."

16 I've submitted evidence to show that
17 we've inspected and we acted reasonably. And
18 under those circumstances we can't be held
19 liable. Whereas, and the same reason
20 McDonald's couldn't be held liable because they
21 actively inspected. If McDonald's hadn't
22 actively inspected, they would not have been
23 able to get out of the case by a simple
24 affidavit saying, "We didn't know anything."

25 In a third matter on Casey's

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1 negligence, her attorney is now arguing for the
2 first time she was negligent. He said Casey
3 was negligent, look at all these facts.
4 Because everybody knows the rule where a party
5 can't say one thing in her deposition, and then
6 based on a motion for summary judgment, say
7 something completely different. That being the
8 case, an attorney is barred from arguing facts
9 that his client has denied under oath. He is
10 stuck with Casey's factual statements that "I
11 was not negligent. Nothing I did or didn't do
12 contributed to my husband's death."

13 I'll turn now to sponsorship liability,
14 I see as other business. Mr. Razzano has gone
15 on and on and on about sponsorship liability.
16 There's no such thing as sponsorship liability.
17 There's only negligent liability. There's only
18 liability for negligent. Sponsors aren't
19 liable just because they're sponsors, they
20 still have to be negligent in order to be found
21 liable, and it's not called sponsorship
22 liability then, it's called negligence
23 liability, and here there's no evidence of
24 negligence.

25 He mentioned that Julia Pocaigue

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1 testified in her deposition that she didn't
2 know anything about how to use a golf cart,
3 that Ambros negligently gave her a golf cart.
4 Negligence requires damages, Julia Pocaigue
5 didn't kill her husband, Casey did. Casey knew
6 how to drive a golf cart because Casey was a
7 golfer, so it wasn't negligent to let Casey use
8 that golf cart. She admitted it. She
9 admitted, "I knew how to drive a golf cart."

10 The last thing was, and this was only
11 touched on briefly. I think it was what Mr.
12 Razzano said. Well, what is it? Everybody
13 else saw the potholes, except Tom Shimizu when
14 he inspected. Well, Casey said she saw the
15 potholes. She said, "I must have seen them
16 during the day." When she was driving her golf
17 cart around. So that's what she said, "I
18 must've seen it, but I don't remember today
19 when I'm testifying. I must have seen them."
20 And I said, "Well, how do you know today that
21 there were potholes there?" She said, "Well, I
22 was at the concert. I saw them after the
23 accident." If she saw them during the day, and
24 she saw them after the accident, she knew they
25 were there. They opened an obvious -- bars.

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1 That's all I have.

2 JUDGE BARCINAS: Thank you, gentlemen.
3 How much time do we need to submit the
4 additional depositions that are still being
5 typed up?

6 MR. RAZZANO: We just took depositions
7 from Wednesday. So I would guess, 30 to 45
8 days, I mean they have to have an opportunity
9 to read their depo transcripts and make any
10 changes to it. So.

11 JUDGE BARCINAS: Yeah. At some point I
12 want to close off the submission of evidence so
13 I can start working on this.

14 MR. ROBERTS: Okay. Just so you know,
15 Judge --

16 JUDGE BARCINAS: Yes.

17 MR. ROBERTS: -- I took those
18 depositions because the discovery cut off
19 deadline is November 19, but I wanted to take
20 those depositions --

21 JUDGE BARCINAS: Understood.

22 MR. ROBERTS: -- at a sufficient time
23 that I could do follow-up depositions if
24 necessary.

25 JUDGE BARCINAS: Okay. Well --

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1 MR. ROBERTS: When is the existing
2 motion cut-off deadline?

3 JUDGE BARCINAS: December 31st.

4 MR. ROBERTS: Well, how would you like
5 to handle it? Just wait?

6 MR. RAZZANO: (pauses)

7 MR. ROBERTS: To submit the depo
8 transcripts on the record.

9 MR. RAZZANO: Yeah. I mean if you want
10 to take some, we can talk about the others.

11 JUDGE BARCINAS: Well, this is under
12 the old rules. This case.

13 MR. RAZZANO: Well, actually, Judge, I
14 kind of disagree with that. I mean, I think --

15 JUDGE BARCINAS: I don't know the date
16 of the filing but I assume it's August 2006.

17 MR. RAZZANO: Yeah. And Judge, I think
18 that the -- well, I think it's under the old
19 schedule order, for sure.

20 JUDGE BARCINAS: Right.

21 MR. RAZZANO: But as far as under the
22 old rules, I mean, I'm pretty sure that the
23 promulgation order from the Supreme Court on
24 June 1st says that all cases are going to be
25 handled retroactively and all cases are now

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1 handled under the new rules. So, that's just a
2 little point. But nevertheless, we have the
3 same schedule in order --

4 JUDGE BARCINAS: They begrudgingly gave
5 us a little bit of discretion.

6 MR. ROBERTS: I have to read those
7 rules again?

8 JUDGE BARCINAS: Yeah. They gave us
9 just that tiny bit that said, if it would not
10 work, that the judges should be allowed to
11 decide which rule that would go and best manage
12 that case. And so, I don't know. I'll leave
13 it to you guys to, you know, you guys are not
14 amateurs at this so --

15 MR. ROBERTS: But we are. We're all in
16 a kind of tough time in between the old rules
17 and the new rules. So I don't mind asking
18 this, Judge. And I have an expert, I've
19 identified my expert, but your current schedule
20 in order requires me to identify this expert in
21 December 10th, it doesn't order me to produce an
22 expert report.

23 JUDGE BARCINAS: Okay.

24 MR. ROBERTS: Whereas under the new
25 rules, I believe your initial brief trial is

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1 where it would require a report. I have to get
2 an expert --

3 JUDGE BARCINAS: Under the new rules,
4 yeah. So --

5 MR. ROBERTS: Do I need to submit an
6 expert report by December 10th? So I need more
7 time.

8 JUDGE BARCINAS: Counsel?

9 MR. RAZZANO: Judge, of course he has
10 to submit an expert report but -- we can work
11 time, we don't need to bother the court with
12 this, the Court has a motion under advisement.
13 We'll submit whatever requirements. If you
14 want to take another discovery reports on that,
15 no need to bother the Judge.

16 MR. ROBERTS: Well, I'd really like to
17 know. The old rules, I don't need to submit an
18 expert report, and that's the current
19 discovery. The current order is identify your
20 expert on December 10th. I'm not on any order
21 to produce an expert report. If the Court
22 orders me right now to produce an expert
23 report, I will.

24 JUDGE BARCINAS: What I'm going to say
25 is that, I think and I feel that this case is

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1 governed by the scheduling order that I issue
2 and is governed by the old rules, and I leave
3 it at that. That's the best way I can say it,
4 because we're too far into this scheduling
5 order to then switch and change the rules about
6 how we're going to conduct this lawsuit. So at
7 this juncture I'm going to stay with the old
8 rules, and that means you guys are free to come
9 back and forth into this courtroom to adjust
10 the schedule under the old rules to fit the
11 needs of the parties. Is that clear as mud for
12 you, Mr. Roberts?

13 MR. ROBERTS: I understand, Judge.

14 JUDGE BARCINAS: Okay. Because, you
15 know, the court is still also learning how to
16 adjust to those new rules, and that's a lot of
17 money to produce those reports if we're not on
18 track for getting a decision out on time. The
19 other thing that I'm looking at is on
20 scheduling this trial date in December may not
21 go anyway because of the criminal trial
22 schedule that's pushing in the background
23 before the end of the holidays.

24 MR. ROBERTS: This case is going to
25 trial in December?

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1 MR. RAZZANO: January.

2 JUDGE BARCINAS: January. That's what
3 I'm saying, but a lot of the things are going
4 to be done.

5 MR. ROBERTS: Otherwise --

6 JUDGE BARCINAS: I'm sorry. Selection
7 in trial on February 11.

8 MR. ROBERTS: Yeah, February.

9 MR. RAZZANO: And then the trial.

10 JUDGE BARCINAS: Pre-trial conferences
11 on February 4th.

12 MR. ROBERTS: Thanks, Judge.

13

14 (Hearing concluded at 11:04 a.m.)

15 **HAGATNA, GUAM, WEDNESDAY, NOVEMBER 14, 2007:**

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REPORTER'S CERTIFICATE

I, **George B. Castro**, Court Reporter, do hereby certify the foregoing 40 pages to be a true and correct transcript of the audio recording provided to me in the time and place as set forth herein.

I do hereby certify the transcript was prepared by me or under my supervision.

I further certify that I am not a direct relative, employee, attorney or counsel of any of the parties, nor a direct relative or employee of such attorney or counsel, and that I am not directly or indirectly interested in the matters in controversy.

In testimony whereof, I have hereunto set my hand and seal of Court this 11th day of February 2008.

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